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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

WILLIE S. MCKINNON,  
Plaintiff,  
  
v.  
  
R. BINKELE, et al.,  
Defendants.

Case No. 18-06035 EJD (PR)

**ORDER OF SERVICE; DIRECTING  
DEFENDANTS TO FILE  
DISPOSITIVE MOTION OR  
NOTICE REGARDING SUCH  
MOTION; INSTRUCTIONS TO  
CLERK**

Plaintiff, a California state prisoner, filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983 against officers at Salinas Valley State Prison (“SVSP”). After an initial screening, the Court found the complaint stated a cognizable claim under the Fourth Amendment based on an unjustified strip search. (Docket No. 7 at 2.) Plaintiff was granted an opportunity to file an amended complaint to attempt to allege physical injury in order to proceed with his claim for mental and emotional injury, and to state sufficient facts to state a claim against Defendant R. Binkele, Sgt. E. Macay, and Officer S. Wong. (*Id.* at 3-4.) In the alternative, Plaintiff was to file notice that he wishes to proceed solely on the Fourth Amendment claim and have all the other claims and Defendants stricken from the complaint. (*Id.* at 4-5.) Plaintiff has filed such a notice. (Docket No. 9.)

1 Accordingly, this action shall proceed solely on the Fourth Amendment claim against  
2 Defendants A. Luge and C. Hernandez.

## 3 4 DISCUSSION

### 5 A. Standard of Review

6 A federal court must conduct a preliminary screening in any case in which a  
7 prisoner seeks redress from a governmental entity or officer or employee of a  
8 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any  
9 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim  
10 upon which relief may be granted or seek monetary relief from a defendant who is immune  
11 from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally  
12 construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

13 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
14 elements: (1) that a right secured by the Constitution or laws of the United States was  
15 violated, and (2) that the alleged violation was committed by a person acting under the  
16 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

### 17 B. Plaintiff's Claims

18 In the initial screening order, the Court found the following claim cognizable:

19 Plaintiff claims that on November 30, 2017, he was directed by  
20 Defendant Officer Luge to speak with a potential cell mate. (Compl. at 3.)  
21 Plaintiff states that the inmate told him that he did not want to move with  
22 Plaintiff. (Id.) Plaintiff claims that before he was returned to his cell,  
23 Defendants Luge and Hernandez ordered him into a shower and without  
24 closing the door, ordered him to strip-down "without cause in a disrespectful  
25 and unprofessional manner" and "to lift his nut sack so he could see what  
26 was under them." (Id.) When Plaintiff refused to do so, Defendant  
27 Hernandez stated to Defendant Luge that "all black men don't have big  
28 dicks because you sure not big [sic]." (Id.) Then Plaintiff requested to talk to  
the Sergeant and was escorted back to his cell. (Id.) Plaintiff seeks damages  
for suffering "shame, humiliation, degradation, emotional distress,  
embarrassment, mental distress and other injuries" due to Defendants'

1 “willful, intentional, malicious, wanton, and despicable and conscious  
2 disregard” of his rights. (Id.) Liberally construed, Plaintiff states a claim  
3 under the Fourth Amendment based on the unjustified strip search that was  
4 conducted “without cause.” See Bell v. Wolfish, 441 U.S. 520, 561 (1979);  
5 Thompson v. Souza, 111 F.3d 694, 700 (9th Cir. 1997).

6 (Docket No. 7 at 2.) This action shall proceed based on the above cognizable claim. In  
7 accordance with Plaintiff’s wishes, all other claims and Defendants shall be stricken from  
8 the complaint.

### 9 CONCLUSION

10 For the reasons state above, the Court orders as follows:

11 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for  
12 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy  
13 of the complaint, all attachments thereto, and a copy of this order upon **Defendants**  
14 **Correctional Officers A. Luge and C. Hernandez at Salinas Valley State Prison (P.O.**  
15 **Box 1020, Soledad, CA 93960-1020).** The Clerk shall also mail a copy of this Order to  
16 Plaintiff.

17 The Clerk shall terminate all other Defendants, i.e., R. Binkele, E. Macay, and S.  
18 Wong, from this action as all the claims against them have been stricken from the  
19 complaint.

20 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil  
21 Procedure requires them to cooperate in saving unnecessary costs of service of the  
22 summons and the amended complaint. Pursuant to Rule 4, if Defendants, after being  
23 notified of this action and asked by the Court, on behalf of Plaintiff, to waive service of the  
24 summons, fail to do so, they will be required to bear the cost of such service unless good  
25 cause shown for their failure to sign and return the waiver form. If service is waived, this  
26 action will proceed as if Defendants had been served on the date that the waiver is filed,  
27 except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve and file  
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1 an answer before **sixty (60) days** from the day on which the request for waiver was sent.  
2 (This allows a longer time to respond than would be required if formal service of summons  
3 is necessary.) Defendants are asked to read the statement set forth at the foot of the waiver  
4 form that more completely describes the duties of the parties with regard to waiver of  
5 service of the summons. If service is waived after the date provided in the Notice but  
6 before Defendants have been personally served, the Answer shall be due sixty (60) days  
7 from the date on which the request for waiver was sent or twenty (20) days from the date  
8 the waiver form is filed, whichever is later.

9 3. No later than **ninety-one (91) days** from the date this order is filed,  
10 Defendants shall file a motion for summary judgment or other dispositive motion with  
11 respect to the claims in the amended complaint found to be cognizable above.

12 a. Any motion for summary judgment shall be supported by adequate  
13 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of  
14 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor  
15 qualified immunity found, if material facts are in dispute. If any Defendant is of the  
16 opinion that this case cannot be resolved by summary judgment, he shall so inform the  
17 Court prior to the date the summary judgment motion is due.

18 b. **In the event Defendants file a motion for summary judgment, the**  
19 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**  
20 **warnings under Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**  
21 **Woods v. Carey, 684 F.3d 934, 940 (9th Cir. 2012).**

22 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court  
23 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'  
24 motion is filed.

25 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and  
26 Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment  
27 must come forward with evidence showing triable issues of material fact on every essential  
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44" IT IS SO ORDERED.

Dated: 2/25/2019 " "



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